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NO. 81-2147

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THE STATE OF ARIZONA, et al.,
Petitioner,

v.

SAN CARLOS APACHE TRIBE OF ARIZONA
AND THE NAVAJO TRIBE OF INDIANS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF SOUTH DAKOTA

MARK V. MEIERHENRY
ATTORNEY GENERAL
State of South Dakota
Pierre, South Dakota 57501
Telephone: (605) 773-3215
Counsel of Record

HAROLD H. DEERING
Assistant Attorney General

JOHN P. GUHIN
Assistant Attorney General

QUESTION PRESENTED FOR REVIEW

WHETHER THE DISCLAIMERS OF STATE JURISDICTION OVER INDIAN LANDS CONTAINED IN ARIZONA'S ENABLING ACT AND CONSTITUTION DEPRIVE ITS STATE COURTS OF SUBJECT MATTER JURISDICTION TO ADJUDICATE INDIAN RESERVED WATER RIGHTS IN A GENERAL STREAM ADJUDICATION UNDER THE McCARRAN AMENDMENT?

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BRIEF OF AMICUS CURIAE
STATE OF SOUTH DAKOTA

INTEREST OF AMICUS CURIAE

The Enabling Act whereby the State of South Dakota was admitted into the Union disclaims "all right and title . . . to all lands . . . owned or

held by any Indian or Indian tribe; . . ." and provides that until such Indian title is extinguished, those lands "shall remain under the absolute jurisdiction and control of the Congress . . . ." Act of Feb. 22, 1889, Ch. 180, 25 Stat. 676, at § 4. That language was subsequently included in the South Dakota Constitution. S.D. Const. Art. XXII, paragraph Second. This disclaimer language is virtually identical to the disclaimer provisions in both the Enabling Acts and State Constitutions of the States of Arizona and Montana.

At issue here is whether that disclaimer language serves to deprive a state court of subject matter jurisdiction to adjudicate Indian water rights held in trust by the United States in a general stream adjudication pursuant to the McCarran Amendment (43 U.S.C. § 666). The United States Court of Appeals for the Ninth Circuit held for the first time that the disclaimer was a bar to subject matter jurisdiction in the

cases of Northern Cheyenne Tribe, et al. v. Adsit, et al., 668 F.2d 1080 (9th Cir. 1982), San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982), and Navajo Nation v. United States, 668 F.2d 1100 (9th Cir. 1982), hereinafter collectively referred to as Adsit.

South Dakota, a disclaimer state, commenced a general stream adjudication in state court on March 17, 1980, and served the United States with process, both in its proprietary capacity and in its fiduciary capacity as trustee for the various Indian tribes in South Dakota, in reliance on the McCarran Amendment. State of South Dakota ex rel. Mark V. Meierhenry v. Rippling Water Ranch, Inc., et al., Civ. 80-100, (Sixth Judicial Circuit 1980). The United States removed the case to federal district court and the adjudication was subsequently remanded to state court on January 19, 1982. State of South Dakota ex rel. Mark V. Meierhenry v. Rippling Water Ranch,

Inc., et al., 531 F.Supp. 449 (D.S.D. 1982). There are currently no federal court proceedings pending in South Dakota which are related to the general adjudication.

This general adjudication will determine the extent and priority of all surface and groundwater rights (except small domestic water rights) in approximately two-thirds of the land area of South Dakota, including the mainstem and western tributaries of the Missouri River and will include approximately 48,000 defendants. The United States has indicated in preliminary proceedings that it intends to assert ownership or trusteeship of about 7.3 million acres of land.

South Dakota undertook this case (as most of the other western states have undertaken similar cases) in order to resolve questions relating to the quantity and nature of both reserved and nonreserved water rights. The decisions of the Ninth Circuit in the Adsit cases seriously jeopardize this effort and ultimately jeopardize the

ability of the State of South Dakota to administer its water laws on a comprehensive basis. South Dakota's interest in an orderly determination of all water rights in the state constitutes its interest herein.

SUMMARY OF ARGUMENT

The State of South Dakota, Amicus Curiae herein, contends that the reasoning of the court in the Adsit decisions is erroneous in the refusal to recognize the applicability of this Court's rationale as set out in the case of Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976); in the refusal to recognize the proprietary/governmental distinction in the application of state disclaimers of right and title to Indian land as set out by this Court in the case of Organized Village of Kake v. Egan, 369 U.S. 60 (1962); in the holding that compliance with Public Law 83-280 (Act of Aug. 15, 1953, Ch. 505, 67 Stat. 588), hereinafter Public Law 280, was the only method of acquiring subject matter

jurisdiction over Indian water rights; and in the rejection of the reasoning of the United States Court of Appeals for the Tenth Circuit as set forth in the case of Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979), cert. den. 444 U.S. 995 (1979). The State of South Dakota respectfully urges that the disclaimer provision has no application in a McCarran Amendment setting because the United States is the proper party defendant to claim Indian water rights; that Public Law 280, by its own language, does not apply to an adjudication of Indian water rights; and, that disclaimer does not serve as a bar to state court subject matter jurisdiction because a general water adjudication is a non-proprietary assertion of jurisdiction by the state. Therefore, the State of South Dakota respectfully urges that the decisions below be reversed.

ARGUMENT

A DISCLAIMER OF STATE JURISDICTION OF RIGHT AND TITLE TO INDIAN LAND CONTAINED IN A STATE ENABLING ACT AND CONSTITUTION DOES NOT DEPRIVE A STATE COURT OF SUBJECT MATTER JURISDICTION TO ADJUDICATE INDIAN RESERVED WATER RIGHTS IN A GENERAL STREAM ADJUDICATION UNDER THE McCARRAN AMENDMENT.

This brief is submitted by the State of South Dakota in support of the Petitioners in the above-captioned matter. The decisions under review involve a question of paramount importance to the western states. In the Adsit cases the Ninth Circuit held, for the first time, that certain disclaimer language found in the respective Enabling Acts and State Constitutions of the States of Montana and Arizona deprived the state courts of subject matter jurisdiction to determine federally reserved Indian water rights in a general water adjudication. It is the position of the State of South Dakota that such a holding virtually precludes the accomplishment of the

congressional objectives of the McCarran Amendment (43 U.S.C. § 666) in the disclaimer states; is in direct conflict with the decision of the United States Court of Appeals for the Tenth Circuit in Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979) cert. den. 444 U.S. 995 (1979); and unduly limits this Court's interpretation of a similar disclaimer provision in the case of Organized Village of Kake v. Egan, 369 U.S. 60 (1962).

In passing the McCarran Amendment in 1952, Congress enacted a statutory waiver of sovereign immunity and granted state courts jurisdiction over the United States in actions involving a comprehensive adjudication of water rights. The McCarran Amendment provides in pertinent part as follows:

> "(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a water system or other source. . . . The United States, when a party

> to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. . . ."

In 1976, this court held that the McCarran Amendment was a grant of jurisdiction to determine federally reserved Indian water rights. Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), hereinafter referred to as Akin. In Akin, this Court reasoned that both the language of the Amendment and the underlying legislative policy of avoiding piecemeal litigation of water rights in a river system supported a holding that the Amendment applied to the adjudication of those reserved water rights of the United States held by it in trust for the Indian tribes. This Court held that a construction of the McCarran Amendment which

excluded Indian water rights from its coverage, "would enervate the amendment's objective." 424 U.S. at 811.

The disclaimer provisions in both the Arizona and Montana Enabling Acts and Constitutions are in substance identical to the South Dakota disclaimer. See Arizona Const., Art. XX, paragraph Fourth; Montana Const., Art. I; S.D. Const. Art. XXII, paragraph Second. The provisions are also similar to the disclaimer clauses with reference to the States of New Mexico, North Dakota, Washington, Wyoming, Utah, and Idaho. These provisions disclaim all right and title to Indian lands, and provide that such lands shall remain within the absolute jurisdiction and control of Congress until the Indian title is extinguished. The Adsit court held that the presence of these disclaimer provisions served as a basis for distinguishing Akin. The Ninth Circuit began its "analytical framework" with the critical assumption

that the disclaimer provision constitutes a disclaimer of subject matter jurisdiction over Indian water rights, viewing the McCarran Amendment simply as a grant of personal jurisdiction over the United States. According to the Adsit court's reasoning, until a state's disclaimer is repealed, the state court has no subject matter jurisdiction and accordingly the McCarran Amendment and the Akin rationale are not applicable.

The Ninth Circuit Court of Appeals relied on the distinction between disclaimer and non-disclaimer states evidenced in Public Law 280 in reaching its decision. The Adsit court concluded that not to apply the disclaimer/ non-disclaimer distinction in a McCarran Amendment setting would rob that distinction of all significance. In essence, the Adsit court holds that disclaimer states must comply with Public Law 280 to implement the McCarran Amendment. Such compliance would include tribal consent to repeal of the disclaimer pursuant to the 1968 Amendments to

Public Law 280. Nothing in the language or legislative history of either Public Law 280 or the McCarran Amendment supports such a proposition.

Initially, the State of South Dakota would point out that Public Law 280, as codified, specifically excludes water rights from its scope:

> "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; . . . or shall confer jurisdiction upon the State to adjudicate,
> in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

25 U.S.C. § 1322(b); see also, 28 U.S.C. § 1360(b), and compare 18 U.S.C. § 1162(b). Therefore, it is difficult to see just what effect compliance with Public Law 280 would have on the disclaimer issue in a water rights setting. Bryan v. Itasca County, 426 U.S. 373 (1976).

Furthermore, this Court in Akin specifically addressed the relationship between Public Law 280 and the McCarran Amendment:

> "To be sure, 25 U.S.C. § 1322(b) and 28 U.S.C. § 1360(b) provide that nothing in those sections 'shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right of possession of [any real or personal property, including water rights, belonging to any Indian or any Indian tribe . . . that is held in trust by the United States].' This provision in both sections, however, only qualifies the import of the general consent to state jurisdiction given by those sections. It does not purport to limit the special consent to jurisdiction given by the McCarran Amendment. A contrary conclusion is foreclosed by the principle of construction that 'where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.'" (Citation omitted) 424 U.S. at 812-13 n.20.

The exclusion of water rights from Public Law 280 jurisdiction is common to both disclaimer and non-disclaimer states. Therefore, the Adsit court's distinction of Akin on the basis of the disclaimer is a dubious one.

In arriving at its decision the Adsit court expressly rejected the reasoning of the Tenth Circuit Court of Appeals in the case of Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979), cert. den. 444 U.S. 995 (1979) where the court declined to distinguish between disclaimer and non-disclaimer states in a McCarran Amendment proceeding. There, the Tenth Circuit considered the effect of the New Mexico disclaimer provision on the jurisdiction of state courts over federally reserved Indian water rights in a general stream adjudication. The New Mexico disclaimer provision is for legal purposes identical to the Arizona and Montana disclaimers. The Jicarilla court ruled that there was no conflict between the disclaimer and the state assumption of jurisdiction. "The basic, fundamental reason is that the United States is the proper party to protect all federally reserved water rights, including those set aside for use by the Indian tribes." 601 F.2d at 1131. The court relied

heavily on the Akin reasoning in reaching that decision.

The Jicarilla court also relied on footnote 20 of the Akin decision in rejecting the Public Law 280 argument later adopted by the court in Adsit, reasoning that the McCarran Amendment's specific grant of jurisdiction was controlling over the general grant of jurisdiction found in Public Law 280.

The Jicarilla court went on to address the argument made by the State of New Mexico that the disclaimer applied only to a proprietary interest in Indian lands, finding such a contention "particularly persuasive in light of the non-proprietary intent in subjecting the United States to a state action involving a general water right adjudication as provided under the McCarran Amendment." 601 F.2d at 1133. The court found that the New Mexico disclaimer prohibited the state from exercising a proprietary interest in the

Indian lands but did not prohibit state control which does not either interfere with tribal self-government or impair a right granted or reserved by federal law. 601 F.2d at 1135.

In reaching that decision, the Jicarilla court relied on this Court's interpretation of the Alaska disclaimer provision in Organized Village of Kake v. Egan, 369 U.S. 60 (1962). There, this Court indicated that the Alaska disclaimer was simply carrying forward congressional policy with reference to admission legislation as evidenced by prior admission legislation touching Indians. That prior admission legislation included Enabling Acts for the states of Arizona, New Mexico, Montana, South Dakota, North Dakota, Washington, Wyoming, Idaho and Utah. The Court explained that Congress' intent by use of the disclaimer "was to preserve the status quo with respect to aboriginal and possessory Indian claims, so that

statehood would neither extinguish them nor recognize them as compensable." 369 U.S. at 65. This Court held:

> "The disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interest. It was determined, after some debate, to be the best way of insuring that statehood would neither extinguish nor establish claims by Indians against the United States." 369 U.S. at 69.

This Court then held that Alaska could regulate the off-reservation fishing of non-reservation Indians, concluding that such regulation neither interfered with Indian self-government nor impaired any right granted or reserved by federal law. The Adsit court seizes upon this factual setting as a basis for distinguishing Kake, and refuses to apply the proprietary/governmental distinction to a question involving reservation Indians on the reservation. Compare, White Mountain Apache Tribe v. Arizona, 649 F.2d 1274 (9th Cir. 1981).

This Court has repeatedly held, that "even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 147-48 (1973); Puyallup Tribe v. Washington Dept. of Game, 433 U.S. 165, 173 (1977). The Adsit court addresses only part of that test and holds that the interference with tribal self-government test set out in Williams v. Lee, 358 U.S. 217 (1958) has no application, relying on the case of McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973). However, the Adsit court does not carry through with the McClanahan rationale in that the Adsit court makes no preemption analysis at all, presumably because of its novel approach to the disclaimer issue.

Unlike the situation in McClanahan where there was a strong congressional policy against

state taxation of reservation Indians, as evidenced by the specific Navajo Treaty involved and the Buck Act, here there is a strong congressional policy, as evidenced by the McCarran Amendment, extending jurisdiction to the states on questions of water rights. As the court held in Jicarilla, supra:

> "'In summary, the cases stress that regulatory powers in Indian country or on Indian lands belong to the Congress except for inherent jurisdiction of the tribes. Congress may delegate this authority to the state, but when it does so it must be in specific terms.' (Citation omitted) Such delegation is precisely the effect of the McCarran Amendment." 601 F.2d at 1135.

The Jicarilla decision is more in accord with the development of case law with reference to various types of Indian disclaimers included in states' Enabling Acts and Constitutions. Those cases indicate that the primary consideration is the constitutional power of Congress over Indian affairs, not the effect of a particular state disclaimer. The power of Congress over Indians is

the same in all states, notwithstanding the respective disclaimer provisions. See Dick v. United States, 208 U.S. 340 (1907). As this Court explained in Coyle v. Smith, 221 U.S. 559 (1911):

> "It may well happen that Congress should embrace in an enactment introducing a new state into the Union legislation intended as a regulation of commerce among the states, or with Indian tribes situated within the limits of such new state, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and therefore would not operate to restrict the state's legislative power in respect of any matter which was not plainly within the regulating power of Congress." 221 U.S. at 574.

The disclaimer is simply a statement of federal law concerning Indian lands; it is declaratory, not a grant of a new right or power to the United States. Congress simply sought to make

clear its plenary power over Indians and to further make clear that admission to statehood on "equal footing" did not mean that Congress surrendered any of that power. That is the policy recognized and carried forward in the Kake decision. To adopt the Adsit rationale would raise serious "equal footing" questions. See, e.g., Pollard et al. v. Hagan et al., 44 U.S. (3 How.) 212 (1845).

The split in logic between the Adsit decision and the Jicarilla decision is clear. The Adsit cases hold that a state constitutional disclaimer is a bar to state subject matter jurisdiction over Indian water rights. The Jicarilla case holds that the disclaimer is inapposite because the United States is a proper party defendant, relying on Akin. The disclaimers involved are as a practical matter identical, as is the South Dakota disclaimer.

CONCLUSION

In light of the growing scarcity of water, there is a vital need for the western states to proceed with an orderly determination of all water rights, a need which compels South Dakota to urge this Court to reverse the decisions below. As a practical matter, the holding of the Ninth Circuit Court of Appeals in the Adsit cases results in an absolute bar to any general adjudication of water rights in many of the states intended to benefit from the McCarran Amendment. Such a result is simply not justified under any federal statute, treaty, or relevant case law. The Ninth Circuit reasoning renders this Court's Akin decision inapplicable in the disclaimer states and virtually distinguishes Kake into nonexistence, and in the process circumvents the strong congressional statement of purpose found in the McCarran Amendment, at least in the disclaimer states.

Furthermore, the Adsit reasoning is in direct conflict with the Jicarilla decision decided by the Tenth Circuit on an identical legal question, a question of supreme importance to the western disclaimer states. The State of South Dakota therefore respectfully urges that the decisions below be reversed.

Respectfully submitted,

MARK V. MEIERHENRY
ATTORNEY GENERAL

Harold H. Deering, Jr.
Assistant Attorney General

John P. Guhin
Assistant Attorney General